IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DEQUAUN McLEAN, aka DEQUAN McLEAN, Appellant.	)	2 CA-CR 2006-0424 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200500904

Honorable Thomas E. Collins, Judge

AFFIRMED AS MODIFIED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant DeQuaun McLean was convicted of two counts of transporting a narcotic drug for sale. The trial court sentenced him to concurrent, enhanced prison terms of 15.75 years. On appeal, he argues the trial court erred by excusing jurors because they could not understand English well, denying his pretrial motion to suppress his statement to police, and refusing his request for an instruction on possession of a narcotic drug. Finding no reversible error, we affirm his convictions and sentences but modify the sentencing minute entry to correct a clerical error.

Excusing Non-English-Speaking Jurors

¶2 McLean first argues the trial court violated his federal and state constitutional rights when it excused two jurors who had difficulty understanding English. Relying on precedent from our supreme court, this court has previously held that exclusion of non-English-speaking prospective jurors does not amount to systematic exclusion of the distinctive group to which they belong and that the inability to understand English is "an appropriate ground to be excused from service." *State v. Sanderson*, 182 Ariz. 534, 538-39, 898 P.2d 483, 487-88 (App. 1995); *see State v. Cordova*, 109 Ariz. 439, 441, 511 P.2d 621, 623 (1973); *see also United States v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993) (inability to understand English race-neutral justification for striking juror). We therefore reject McLean's claim on this issue.

Motion to Suppress Statement

¶3 McLean next argues the trial court erred by denying his motion to suppress his statement to police, which he contends was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and was involuntary. We review both rulings for an abuse of discretion, considering only the evidence presented at the suppression hearing and viewing that evidence in the light most favorable to sustaining the trial court's rulings. *See State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007); *see also State v. Newell*, 212 Ariz. 389, n.6, 132 P.3d 833, 840 n.6, *cert. denied*, ___ U.S. ___, 127 S. Ct. 663 (2006) (same standard of review applies to rulings on *Miranda* and voluntariness issues). We review de novo the court's legal conclusions. *See State v. Smith*, 197 Ariz. 333, ¶ 2, 4 P.3d 388, 390 (App. 1999).

¶4 McLean contends he did not validly waive his rights to counsel and to remain silent before police interviewed him. But, when one of the officers conducting the interview said he wanted to be sure McLean understood his rights, McLean acknowledged that the officer had arrested him before and told the officer that the officer did not have to say anything. Then, after the officer read McLean *Miranda* warnings and asked if he understood, McLean responded, "Yeah," and immediately asked if he could take a polygraph test "so [the officer would] know [he was] telling the truth." Although the officer told him it was not possible to administer a polygraph test, McLean went on to have a lengthy discussion with the officer, during which he made incriminating statements. By stating he understood

his rights and then engaging in "a course of conduct indicating waiver," *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), he validly waived his rights to remain silent and to counsel. *See State v. Trostle*, 191 Ariz. 4, 14, 951 P.2d 869, 879 (1997) ("'Answering questions after police properly give the *Miranda* warnings constitutes a waiver by conduct.'"), *quoting State v. Tapia*, 159 Ariz. 284, 287, 767 P.2d 5, 8 (1988); *see also State v. Cañez*, 202 Ariz. 133, ¶ 59, 42 P.3d 564, 584 (2002) (same; also noting defendant's prior experience with criminal system).[1]

¶5 McLean suggests some Arizona decisions on *Miranda* waivers are factually distinguishable because each of them involved either express written consent or "repeated efforts by police to obtain express consent." But *Tapia* involved neither. Although officers there read Tapia his rights several times, nothing in the opinion suggests that the defendant provided express written consent or that the officers tried to obtain express consent. *See Tapia*, 159 Ariz. at 286-87, 767 P.2d at 7-8. Instead, the defendant acknowledged he had received and understood his rights before going on to answer questions freely without attempting either to clarify his rights or assert them. *Id.* Here, similarly, McLean acknowledged that he had been arrested previously by the same officer and that he had understood his rights before he proceeded to engage in conduct indicating waiver. Given

[1]McLean suggests Arizona decisions have "chipped away impermissibly at the holding of *Miranda*." But we have no authority "to modify or disregard" decisions of our supreme court. *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004).

those circumstances, the trial court did not abuse its discretion in concluding McLean waived his rights to counsel and to remain silent.

¶6 McLean also contends that, even if his initial *Miranda* waiver was valid, he later indicated he no longer wished to continue speaking when he said the following: "I'm asking, now I'm asking you a question. You know I say, I don't give a f- - -. You can keep me here. I'll just keep my mouth shut and go to jail, do my little time." But McLean prefaced his statement by offering the hypothetical situation that the drugs were not his and saying he was asking a question. Thus, in context, the trial court could properly find McLean's statement was not an indication that he wished to remain silent. *See State v. Stabler*, 162 Ariz. 370, 375, 783 P.2d 816, 821 (App. 1989). Therefore, the court did not abuse its discretion in implicitly concluding the continued questioning was proper.

¶7 McLean next contends his statement was involuntary because the officers threatened harsh treatment of his girlfriend and the couple's young child. But the officers merely noted that his girlfriend, who had been driving the car at the time of the arrest in this case, had been arrested for possession also, and they asked if McLean wanted to try to get her "off the hook." Under the circumstances, the trial court could properly determine the officers' statements about his girlfriend and child were not threats. *See Newell*, 212 Ariz. 389, ¶ 49, 132 P.3d at 844 (finding statement about person for whom defendant cared did not rise to level of threat); *Tapia*, 159 Ariz. at 289, 767 P.2d at 10 (no coercion under circumstances where officer might have stated defendant would not see girlfriend or child

again); *cf. State v. Ross*, 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994) ("A confession is not inadmissible when police 'only point out the obvious fact that if the guilty person is found it will be unnecessary to hold others.'"), *quoting State v. Ferguson*, 119 Ariz. 55, 60, 579 P.2d 559, 564 (1978).

¶8 In a related argument, McLean contends the officers promised to treat his family leniently in exchange for his cooperation. "[A] direct or implied promise, however slight, will render a confession involuntary when it was relied upon by the defendant in making a confession." *Newell*, 212 Ariz. 389, ¶ 44, 132 P.3d at 843. But, after McLean stated he wanted help for his girlfriend and child, the officer had made it clear that all he would do was tell the prosecutor that McLean had cooperated. *See State v. Strayhand*, 184 Ariz. 571, 579, 911 P.2d 577, 585 (App. 1995) ("Police may offer to tell the prosecutor about the defendant's cooperation and suggest that such cooperation may increase the likelihood of a more lenient sentence."). Additionally, McLean did not follow his comments about his girlfriend and child with an incriminating statement, but rather with an offer to make a "control[led] buy," suggesting he did not rely on any alleged promise in ultimately making the incriminating statement. *See State v. Hall*, 120 Ariz. 454, 457, 586 P.2d 1266, 1269 (1978) (impermissible promise does not render confession involuntary unless relied upon).

¶9 McLean cites *State v. McFall*, 103 Ariz. 234, 439 P.2d 805 (1968), in support of his argument. In *McFall*, the defendant was a drug addict who had been arrested for

forging prescriptions for narcotics. When he asked officers to give him some of his drugs, their answer implied they might give him some if he completed the interrogation. *Id.* at 235-36, 439 P.2d at 806-07. The supreme court noted the "possible compulsive circumstances" created by "insinuati[ng]" officers might give an addict drugs and held the defendant's subsequent statement was involuntary. *Id.* at 237, 439 P.2d at 808. Here, in contrast, no "compulsive circumstances" existed, and the officer clarified that the most he could do was tell the prosecutor McLean had been cooperative. *See Strayhand*, 184 Ariz. at 579, 911 P.2d at 585. Additionally, as discussed above, McLean's comments do not demonstrate that he relied on any implied promise. The trial court did not abuse its discretion in finding McLean's statement was voluntary.

Refusal to Instruct on Simple Possession

¶10 McLean last argues the trial court erred when it refused his request to instruct the jury on possession of illegal drugs as a lesser and necessarily included offense of transportation of illegal drugs for sale. This court recently held that possession of a dangerous drug is not a lesser-included offense of transportation of a dangerous drug for sale because possession requires a showing that the defendant possessed a "useable quantity" of drugs while transportation for sale has no quantity element. *State v. Cheramie*, 217 Ariz. 212, ¶¶ 6-7, 171 P.3d 1253, 1256-57 (App. 2007). Both the state and McLean question whether *Cheramie* is applicable here because this indictment alleged specific, clearly useable quantities of narcotic drugs, thus potentially rendering possession a lesser-included

offense in this case. *See State v. Robles*, 213 Ariz. 268, ¶ 5, 141 P.3d 748, 750-51 (App. 2006) (offense may be lesser-included when described in charging document). We need not resolve this question, however, because we conclude that, even if possession is a lesser-included offense of transportation for sale in this case, it is not a necessarily included offense under the facts of the case. Therefore, the trial court did not err in denying McLean's request for the instruction.

¶11 A trial court is required to give a requested instruction on a lesser-included offense when it is shown that the lesser offense is also necessarily included based on the evidence. *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006). For an offense to be necessarily included, two conditions must be met: "The jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Id.* ¶ 18. In this case, the state presented overwhelming evidence establishing all the elements of transportation for sale. *See* A.R.S. § 13-3408(A)(7). And we can find no evidence from which a reasonable juror could conclude that McLean was guilty of possession alone. *See* § 13-3408(A)(1). Although McLean contends the jury could have found that he had been unaware of the quantity of the drugs he possessed, his claim is the sort of "theoretical" hope rejected in *Wall* as a basis for a necessarily included instruction. *See Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151. The trial court did not err in denying McLean's request for an instruction on possession.

Conclusion

¶12 For the foregoing reasons, we affirm McLean's convictions. We note that the sentencing minute entry erroneously states that McLean's sentences were enhanced for "dangerous" and "nonrepetitive" offenses. At the oral pronouncement of sentence, however, the trial court correctly stated that the offenses of conviction were "nondangerous" but "repetitive" based on McLean's two historical prior felony convictions. *See* A.R.S. § 13-604(D); *see also State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999) (oral pronouncement of sentence controls in event of disparity between transcript and minute entry). We therefore modify the sentencing minute entry to reflect that the offenses are "nondangerous" and "repetitive." *See State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990). We affirm the sentences as modified.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge